Supreme Court, U.S.
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No. 90-1520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AQUA-CHEM, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT

IN ITS BRIEF, THE NATIONAL LABOR RELATIONS BOARD HAS MISCHARACTERIZED THE PETITIONER'S ARGUMENT AND JUDGE POSNER'S DISSENT

Throughout the judicial appeal process, Petitioner has consistently maintained one simple and straightforward proposition: so long as laid off replacements possess contractual recall rights, there is no "vacancy" as would trigger *Laidlaw* striker replacement rights. In its brief, the National Labor Relations Board mischaracterizes this argument and Judge Posner's acceptance of it in his dissent, as one of waiver — "that the contract provision respecting recall from layoff was intended to alter the striker's *Laidlaw* rights." (Respondent's brief, p. 11). It is not the Petitioner's argument that the

contract serves to "alter" the reinstatement rights of strikers, but rather that it defines those rights in the first instance.

In the underlying decisions, the National Labor Relations Board, as affirmed by the Seventh Circuit, held that the existence or non-existence of a *Laidlaw* vacancy would be determined by whether or not a laidoff replacement has a reasonable expectation of recall. If such an expectation exists, then the layoff does not create a vacancy and the replacement may lawfully be recalled.

It is Petitioner's argument that each employee covered by the contract, including permanent replacements, has a reasonable expectation – premised upon contractually guaranteed and enforceable recall rights – that he or she will be recalled to whatever openings might arise during their period of seniority retention. Such a right exists irrespective of whether the likelihood of being able to exercise it is definite and certain or more speculative and remote at the time of layoff. The argument is not one of waiver, but rather one of affording the replacements the full extent of the contractual protection to which they are entitled as permanent employees.

The Board does not dispute that the replacements were entitled to recall protection. It simply asserts that the reinstatement rights of the striker supersede that protection because, in its assessment, the replacements could not have reasonably expected to be recalled at the time they were laid off. The Board focuses on a speculative analysis of the business conditions at the time of the layoff rather than focus on what actually occurred – a recall within the defined period of seniority retention. Why?

If a gambler in Las Vegas places a chip on one number at the roulette table, he may not have a reasonable expectation of having his number come up, but he does have a reasonable expectation that the casino will pay him off if it does. So it was with the replacements in this case. The economic forecast at the time of the layoff was negative but the replacements nevertheless possessed a reasonable expectation – indeed, a right – of being recalled to whatever

openings might arise during their period of seniority retention. When openings did in fact occur, Petitioner did nothing more than honor its contractual obligation to the replacements through recall.

The Board has disregarded reality in favor of a speculative assessment by which it has concluded that what did happen should not have happened. At the NLRB's casino, the lucky roulette player is denied his payoff because it was not reasonable for him to have expected to win when he placed his bet. There is no way that such a strained form of analysis and its absurd result can be reconciled with this Court's decision in *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

CONCLUSION

For the reasons presented here and in the Petition, it is respectfully submitted that a Writ of Certiorari should be issued to review the decision of the United States Court of Appeals for the Seventh Circuit below.

Dated at Milwaukee, Wisconsin this 19th day of June, 1991.

Respectfully submitted,

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